In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 482

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

TAFT B. SCHREIBER AND MCA, INC.

REPLY BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In our petition we pointed out that the decision of the Ninth Circuit upholds the district court's authority to decide, in the first instance, the degree of confidentiality to be accorded information sought by the Commission, and places upon the agency the burden of justifying public disclosure of such information. We urged that this holding ran counter to judicial and statutory authority which stand for the proposition that the agency has the right to decide this question initially and that the burden of demonstrating the need for confidentiality rests on the party who seeks it. It is no answer to say, as respondents do, that the court's order represented a "sensible approach." The issue we raise is whether the court should institute a procedure or whether, as we contend, its function is to review the action of the agency

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in order to determine whether an abuse of discretion has occurred.

Respondents seek to avoid this basic question and to justify the decision below on the grounds that MCA was being treated differently from others who had been called on to testify and that no safeguards had been specified by the Commission to prevent disclosure of information that could properly be deemed confidential. Both contentions are unfounded. As the largest talent representative in the United States and as a major "packager" of television programs, MCA was an important source of information for purposes of the Commission's investigation. But other parties, including MCA's chief competitor in the talent field, had been called to testify and had freely complied with requests for the same kind of information that the Commission sought from MCA. Moreover, procedures to accommodate claims of confidentiality had been plainly set forth (R. 12–13). MCA could assert such claims with respect to any item of information called for and the presiding officer was empowered to take the evidence *in camera* if non-disclosure was justified. And, in the event of an unfavorable ruling, respondents would still have the right (as they ultimately concede, Brief, p. 13) not to have the material in question publicly disclosed until the court had passed on the issue of confidentiality.

The authority of the Commission to establish procedures of this kind is clear, 47 U.S.C. 154(j), *F.C.C.* v. *WJR*, 337 U.S. 265, 282; and where its actions do not constitute an abuse of discretion its judgment

should be upheld. *American Sumatra Tobacco Corp.* v. *S.E.C.*, 93 F. 2d 236, 239 (C.A. D.C.). Respondents attempt (Brief, p. 11) to distinguish this case from *American Sumatra* by arguing that MCA is not subject to FCC regulation; that the Commission had prescribed no procedure for dealing with the question of confidentiality; and that, unlike the situation involved in proceedings before the SEC, the regulatory scheme here does not rely on a concept of disclosure. Those distinctions are insubstantial and in any event irrelevant to the question whether the court can properly consider *de novo* the issue of confidentiality.

Although MCA is not subject to the Commission's licensing authority, the right of the Commission to obtain the information in question has not been contested [1]—only the manner in which it is to be treated.

While it is true that the SEC had adopted procedural rules dealing with the question of confidentiality, the Commission's orders governing the course of the hearing in this case fully specified the procedure to be followed.[2] This procedure allowed respondents to be heard on the question of confidentiality and, as noted *supra*, there could be no public disclosure until the issue had been reviewed by the courts. In the circumstances, the fact that one agency proceeded by

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[1] Cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186; *Stahlman* v. *F.C.C.*, 126 F. 2d 124 (C.A. D.C.).

[2] Respondents' contention below that this did not afford adequate notice was rejected by both the district court and the court of appeals, and no further review of the question was sought. 201 F. Supp. 421, 425; 329 F. 2d 517, 527.

rule and the other by *ad hoc* procedures of which all parties were fully apprised is of no significance.

Lastly, considerations favoring public disclosure are not confined to the SEC. On the contrary, public disclosure is a principle of general applicability common to all administrative agencies. See, *e.g.*, *E. Griffith Hughes, Inc.* v. *Federal Trade Commission*, 63 F. 2d 362 (C.A. D.C.). Initial determination of the question properly belongs with the agency, and the burden of establishing the need for non-disclosure is plainly on the party who seeks suppression. Administrative Procedure Act, Section 3(c), 5 U.S.C. 1002 (c); compare Federal Rules of Civil Procedure, Rule 30(b).

This case is ripe for review. For the question is not, as respondents contend, whether a particular ruling on the question of confidentiality is correct but where the responsibility to make that ruling lies. The decision below holds that a district court may set aside the procedures established by the Commission and that it has broad discretion to establish others *de novo*. Because of the conflict represented by this holding and because the issue has significant con-

sequences for all regulatory agencies, review by this Court is warranted.

Respectfully submitted.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinions of the court of appeals are reported at 329 F. 2d 517. The opinion of the district court is reported at 201 F. Supp. 421.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1964 (R. 171). A timely petition for rehearing *en banc* was denied on May 4, 1964 (R. 177). On August 3, 1964, the Chief Justice granted an extension of time within which to file

a petition for a writ of certiorari to and including September 10, 1964 (R. 177). The petition was filed on that date and granted on December 7, 1964 (379 U.S. 927). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has authority, subject only to judicial scrutiny for abuse of discretion, to determine if testimony given and documents received pursuant to subpoena at an authorized investigatory hearing should be kept confidential.

2. Whether the Commission may impose on the witness who requests confidentiality for information received at an investigatory hearing the burden of justifying such treatment.

STATUTES INVOLVED

Administrative Procedure Act, Section 3(c), 60 Stat. 237, 238, 5 U.S.C. 1002(c):

> Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.;* Section 4:

> (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

(k) The Commission shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such reports shall contain—

(1) such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy;

* * * * *

Section 303:

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * *

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Section 403:

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

Section 409:

(f) Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United

States, at any designated place of hearing. And in case of disobedience to a subpena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(g) Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any common carrier or licensee or other person, issue an order requiring such common carrier, licensee, or other person to appear before the Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Section 412:

The copies of schedules of charges, classifications, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers and other persons made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of

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said schedules, classifications, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals: *Provided,* That the Commission may, if the public interest will be served thereby, keep confidential any contract, agreement, or arrangement relating to foreign wire or radio communication when the publication of such contract, agreement, or arrangement would place American communication companies at a disadvantage in meeting the competition of foreign communication companies.

STATEMENT

This case involves a subpoena and orders issued in the course of an investigatory proceeding conducted by the Federal Communications Commission pursuant to Section 403 of the Communications Act of 1934, as amended, 47 U.S.C. 403 (p. 4, *supra*). The proceeding was initiated on February 27, 1959, and was financed by a specific Congressional appropriation.[1] During the Senate hearings on the appropriation, Chairman McConnaughey of the Commission advised:[2]

> The House also added $80,000 to our request for "such expenses as are necessary to make a

[1] Independent Offices Appropriation Act, 1956, 69 Stat. 199.

[2] Hearings before the Subcommittee of the Senate Appropriations Committee, Independent Offices Appropriations for 1956, 84th Cong., 1st Sess., pp. 293, 294. See also Hearings before the Subcommittee of the House Appropriations Committee, Independent Offices Appropriations for 1956, 84th Cong., 1st Sess., pp. 663–664.

> study of radio and television network broadcasting." The Commission agrees that such a study, particularly as relates to television, would be very worthwhile. * * *
>
> The objective of such a study would be to obtain for the first time comprehensive information concerning the respective roles played by networks, advertisers, agencies, talent, film producers and distributors, and other major elements in the television industry.
>
> Only with this information can the problems affecting the further expansion of television outlets be adequately identified and evaluated, and appropriate recommendations made for their solution. To accomplish the program it would be necessary to consider not only information now in the Commission's files but also to collect data from outside sources.

Chairman McConnaughey then explained that the material collected would be analyzed and would form the basis of recommendations to Congress "as would appear necessary and desirable in the light of the analysis." On the floor of the Senate, Senator Magnuson, Chairman of the Appropriations Subcommittee and also Chairman of the Senate Commerce Committee, explained that the investigation was important "because we [Congress] will be able to draw upon the facts which are obtained by an examination of the contracts" of the industry. 101 Cong. Rec. 7629.

1. *The Commission proceedings.*—As an initial step in this investigation, the Commission ordered a hearing to discover "the policies, practices, mechanics and surveillance pursued and carried out by networks,

station licensees and others in connection with the acquisition, ownership, production, distribution, selection, sale and licensing of programs for radio and television exhibition * * * and the reasons and necessity in the public interest for said policies and practices * * *" (R. 27). 24 F.R. 1605. In its order the Commission noted that the information it sought was necessary (1) as a part of its general investigation of television programs undertaken pursuant to the Independent Offices Appropriations Act; (2) to determine what, if any, rules, regulations, legislation, or other actions were necessary or desirable in the public interest in connection with television programming; (3) to determine the steps necessary to encourage larger and more effective use of television in the public interest; (4) to determine where the public interest lies in the granting of construction permits, station licenses, and modifications and renewals; (5) to report to Congress on matters relating to the regulation of broadcasting; and (6) to build a public record on which both Congress and the Commission might act (R. 20–22).

The Commission authorized its chief hearing examiner to conduct the investigation. He was empowered to subpoena witnesses, compel their attendance, and require the production of papers deemed relevant to the inquiry (R. 22). The investigatory proceeding was to be "a public proceeding except that the said presiding officer may order non-public sessions of the said investigatory proceeding where and to the extent that the public interest, the proper dispatch of the

business of said proceeding, or the ends of justice will be served thereby" (R. 22).

Public sessions were held in Los Angeles, California, in October 1960, at which time evidence was received concerning the functions, policies and practices of a number of Hollywood-centered television production companies, talent agencies, talent representatives, program "packagers,"[3] sales representatives and others (R. 11–12). Respondent MCA, Inc., was one of the largest packagers and producers of network television programs. As of 1960, that company owned approximately 1,657 television negatives, substantially all of which had had at least one exhibition on a national network or equivalent exhibition in syndication (R. 52). For the 1959–1960 season, the company produced seven film series of its own, utilizing 121 hours of evening viewing time (R. 52). In addition, for the same season it associated with others in the production of eight film series which occupied 137.5 hours of time during the season (R. 52). The company also owned 700 pre-1948 feature-length movies for which it had paid $50,000,000 (R. 70) and a 370-acre studio which it had purchased in 1959 for $11,250,000 (R. 71).

On October 17, 1960, the chief hearing examiner issued a subpoena duces tecum directed to respondent Taft B. Schreiber, a vice-president of MCA, directing him to appear at the hearing and to produce certain

[3] "Packagers" develop and assemble the talent and scripts for a particular program or programs. A "producer" has general charge of the process of preparing the package for television production.

documents described in annexes to the subpoena (R. 12). Schreiber appeared and produced the material required by Annex A of the subpoena[4] (R. 30). He refused, however, to produce without qualification the material required by Annex B,[5] which included a list of the programs packaged by MCA, although he admittedly had such a list in his possession in the hearing room (R. 30–32). He agreed to testify regarding the subpoenaed documents and to produce them only "if the Commission will take this information and assure us that it will be held confidential,

[4] "(A) A list by name or title of all television programs whether series programs, special programs, or otherwise, which appeared or were exhibited by or through the facilities of the television networks operated by NBC, CBS, or ABC since September 1, 1958, which programs were produced by MCA, Inc. or Revue Productions, Inc. and/or in which MCA, Inc. or Revue Productions, Inc. has or had a financial or proprietary interest or with regard to which MCA, Inc. or Revue Productions, Inc. is or was entitled to receive or has received a percentage of the profits or other compensation or fees in connection with the production or exhibition of such programs other than remuneration or compensation for the representation as agent of individual natural persons as talent" (R. 6–7).

[5] "(B) A list of all television programs whether series programs, special programs, or otherwise, which appeared on or were exhibited by or through the facilities of the television networks of NBC, CBS, or ABC, since September 1, 1958, in which MCA, Inc. or any predecessor affiliate or subsidiary of MCA, Inc. acted as packager and/or, by agreement or otherwise, is entitled to receive or has received a percentage of the cost or selling price of said program or was or is entitled to receive or has received other compensation, remuneration or fees in connection with the packaging, licensing for broadcast or selling of said program, otherwise than as remuneration or compensation for the representation as agent of individual natural persons as talent" (R. 7).

will not be published, and will not be made available to other people, other than those on the Commission, and that serve the Commission * * *" (R. 32). The relevant colloquy regarding the production of the documents was as follows (R. 30–31):

> Q. Well, will you now produce the information, sir?
>
> A. We will be happy to produce it on the basis of its being kept confidential.
>
> Q. I ask you again, sir, will you produce the information for us here now as called for by the subpoena?
>
> A. I respectfully submit that we cannot produce confidential information for this record.
>
> Q. Well, now, is it your contention, sir, that the information called for in subparagraph B of the Annex is confidential, is that it?
>
> A. Yes, sir.
>
> Q. Well, will you tell us, Mr. Schreiber—are you familiar with the testimony given here yesterday by the representatives of the William Morris Agency?
>
> A. Just by hearsay.
>
> Q. I see. Well, generally, will you tell us why, if you wish to do so—why this information called for in subparagraph B is, in your judgment, confidential information?
>
> A. Well, this relates to personal relationships, agency relationships with the client. It is confidential in that these are matters really belonging to principals other than ourselves.
>
> And, we think that we, in effect, would be not only violating that fiduciary, but at the same time making available information that might be used detrimentally; it would be

possibly advantageous to our competitors and people who might welcome that information.

And it has never been generally given.

It has been the policy of our company not to give this information. And it has been a policy for many years.

Q. Does that adequately state your position, sir?

A. Yes.

The hearing examiner denied the claim that the information should be received in confidence as "without merit" (R. 38).

Respondents appealed to the Commission, which, on January 25, 1961, affirmed the examiner and ordered respondents to appear, testify and produce the material sought by the subpoena at a reconvened public hearing (R. 17–18). It explained its earlier conclusion that "public proceedings should be the rule" on the ground that the subject matter of the inquiry was of concern to Congress, to station licensees, and to other segments of the industry and the public (R. 11). The processes involved in the production, sale and distribution of television programming were, according to the Commission, "complex and generally unknown" (R. 10). To insure intelligent assessment of the information obtained in this area, it concluded that it would be "highly desirable" that the facts, information, data and opinion supplied by one group or individual should be known to other interested groups and individuals so that they might "verify, refute, explain, amplify or supplement the record from their own diverse points of view" (R. 11). The

Commission also held that the hearing examiner could proceed *in camera* if it were demonstarted that public disclosure would irreparably damage private competitive interests and if such injury outweighed the considerations favoring open hearings (R. 11, 18). The Commission found, however, that the claim in this case that disclosure of the information sought would bring competitive harm to respondents was "totally unsupported by their pleadings and contrary to the record" (R. 13). The Commission went on to note (pp. 13–14):

> None of the information sought by the subpoenas now outstanding is detailed financial information of the sort involved in *FCC* v. *Cohn, et al.*, 154 F. Supp. 899 (D. Ct., S.D. N.Y.). Moreover, it appears that information and testimony of exactly the same kind and type as that now offered as "confidential" by MCA was produced by witnesses for William Morris and other competitors of MCA without question as to its inclusion in the public record. Evidence similar to that sought from the other petitioners was freely given by another person engaged in a similar business. It appears further that, in eliciting testimony and requesting data from such other persons, the Presiding Officer and Commission counsel have made every effort to avoid public disclosure of detailed internal financial information or detailed contractual arrangements which might in fact irreparably harm private interests without sufficient compensating benefit to the public. We concur in the Presiding Officer's finding on this record that there is nothing of a confidential

nature in the matters sought to be elicited from these petitioners which would require that their testimony be made part of the non-public docket.

The Commission thereupon ordered that the information be produced in a public hearing except to the extent that the hearing examiner should order otherwise (R. 13, 17–18). When the hearing reconvened, respondents persisted in their refusal to comply with the subpoena and the Commission's order (R. 46–48).

2. *Judicial proceedings.*—The Commission thereupon petitioned the district court for the enforcement of its subpoena and orders.[6] In opposing the Commission's petition, respondents contended, *inter alia*, that the Commission erred in refusing to receive the testimony and documents in confidence (R. 101). After hearing argument, the district court ordered respondents to appear at a reconvened hearing to testify and to produce the material sought by the subpoena (R. 129). But on the basis of the "record herein," the court found that "in protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage" it was necessary that "all further testimony" of respondents be taken in confidence (R. 125). It thereupon ordered the examiner and the Commission to hold confidential all information submitted unless and until the Commission, in an adversary proceeding, demon-

[6] See Sections 401(a), 401(b), 409(f) and 409(g) of the Communications Act of 1934, as amended, 47 U.S.C. 401(a), 401(b), 409(f) and 409(g), (R. 1–5).

strated to the court "good cause" for making the testimony and documents public (R. 129).

On appeal, a majority of the court of appeals affirmed the portion of the district court's order which pertains to the questions now before this Court.[1] The majority held that the district court had discretion to determine on its own the need for confidential treatment of evidence to be presented to the Commission, and that the court had not abused its discretion in this regard (R. 144). Judge Browning dissented. He said that the determination whether the subpoenaed information should be kept confidential should have been left to the discretion of the Commission. It was his view that the district court might require confidentiality only if the Commission's refusal to accord confidential treatment to MCA's

[1] Certain other issues were presented to the court of appeals which are no longer in the case. The Commission appealed from that portion of the district court's order permitting counsel for respondents to object to questions by the Commission, and to present, on the record, concise grounds and reasons for such objections. This issue was rendered moot by the Commission's amendment to Part I of its Rules and Regulations on September 2, 1964. 29 F.R. 12774–12775 (Sept. 10, 1964). Witnesses compelled to appear at any Commission proceeding are now accorded the right to have their counsel "make objections on the record, and to state briefly the basis for such objections, in connection with any examination of his client." See our Petition for a Writ of Certiorari in this case, Appendix E, p. 64, for the complete text of this amendment.

Respondents also contended that the Commission had failed to comply with the requirement of Section 3(a) of the Administrative Procedure Act, 5 U.S.C. 1002(a), regarding the promulgation of procedural rules to cover administrative proceedings. The court of appeals rejected that claim, and respondents have not sought this Court's review of that issue.

documents and to Schreiber's testimony could be deemed to constitute an abuse of the Commission's discretion. Judge Browning also agreed with the Commission's position that the burden of proof in this case rested with the party who opposed the public proceeding (R. 158). The Commission's petition for rehearing *en banc* was denied (R. 172–176, 177).

ARGUMENT

Introduction and Summary

In affirming the order of the district court insofar as it relates to the confidentiality issue which is before this Court, the court of appeals erred in two respects.

First, it sanctioned the district court's substitution of its own discretion for the discretion exercised initially by the Federal Communications Commission. As we demonstrate below, the determination whether or not to receive testimony or other evidence relevant to an investigatory hearing *in camera* has been committed by Congress primarily to the Commission, and a district court may upset the Commission's decision only if it is satisfied that the Commission has abused its discretion. An appellate court must similarly decide whether the exercise of discretion *by the Commission* was within permissible limits. The court of appeals misapprehended this standard when it made the case turn on whether the district court, and not the Commission, had abused its discretion.

Second, the court of appeals erred in failing to accord sufficient weight to the strong policies favoring

public disclosure of investigatory proceedings conducted by the Federal Communications Commission. In a proceeding such as the one involved in this case, there are sound reasons of policy warranting full public access to evidence produced during the inquiry. Hence, in the absence of any agency rule to the contrary, the burden was on the party requesting secrecy to establish that his circumstances warranted an exception to the usual rule.

I

THE FEDERAL COMMUNICATIONS COMMISSION HAS DISCRETION TO DETERMINE WHETHER EVIDENCE SUBPOENAED FOR AN INVESTIGATORY HEARING SHOULD BE RECEIVED IN CAMERA OR IN PUBLIC

Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(j), empowers the Federal Communications Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." This Court has interpreted this provision as "explicitly and by implication [leaving] to the Commission's own devising" the "subordinate questions of procedure * * * [such as] the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions * * *." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138. In *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 282, the Court observed that the Act "left largely to [the

Commission's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate [the ends of justice]." This sweeping authorization was not subsequently limited by applicable provisions of the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*, and hence it made the Commission the principal master of its own proceedings.

The broad authority vested in the Commission in this regard was, as the Court observed in the *Pottsville Broadcasting* case, a specific application of the established principle that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." 309 U.S. at 143. Subsequent decisions have reaffirmed the principle in a variety of applications, and it is rooted in sound policy judgments. See *Civil Aeronautics Board* v. *Hermann,* 353 U.S. 322; *Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186, 216; *Wallace Corp.* v. *National Labor Relations Board,* 323 U.S. 248, 253; *Endicott Johnson Corp* v. *Perkins,* 317 U.S. 501, 509. Agencies and administrators are presumed to be familiar with the industries which they regulate, and they are in far better position than courts to design procedural rules adapted to the peculiarities of those industries. Such rules should be reviewable only for abuse of discretion or for inconsistency with some particular governing statute. A standard of review which would permit district courts to decide questions of administrative procedure *de novo* would

substitute for the informed expert judgment of an agency a determination based upon far less familiarity and experience with the industry than the agency possesses.

The particular issue around which this case revolves—whether respondents' evidence, subpoenaed for an investigatory hearing, should be received in public session or *in camera*—is precisely the sort of procedural question which should be left primarily to the discretion of the agency. Resolution of that issue turns on an assessment of the value to the investigation of public disclosure of respondents' information and of the harm likely to be suffered by respondents as a result of such disclosure. The Commission, which is conducting the investigation and is acquainted with the facts which most require public attention and verification, is better suited for the task of weighing the need for public disclosure than is a court. And, since the Commission is in day-to-day touch with the industry and is more familiar with its competitive features than a court, it is more qualified than a district judge to evaluate the competitive impact which might result from public disclosure of the subpoenaed evidence. Respondents are adequately protected against arbitrary or otherwise improper rulings in this regard by their right to have the Commission's rules modified if its terms amount to an abuse of the agency's discretion.

Moreover, the Commission's discretion here is entitled to even greater weight because this case involves an investigatory hearing rather than adjudica-

tion. The purpose of the Commission's inquiry was to inform both the Commission and Congress of the practices involved in radio and television network broadcasting—an industry which had experienced phenomenal growth in the preceding decade and which was exercising considerable influence on contemporary American society. In executing this fact-finding function, the Commission was entitled to broader latitude in its procedural rulings than if it were engaged in an adjudicative capacity. See *Hannah* v. *Larche,* 363 U.S. 420, 443–451. Restrictive judicial limitations on the power of the agency to proceed in any manner it reasonably believed necessary in order to gather information "would make a shambles of the investigation and stifle the agency in its gathering of facts." 363 U.S. at 444.

The recognized power of an administrative agency to determine whether to proceed in an investigation publicly or privately is illustrated by this Court's decision in *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294. In that case, the validity of a Presidential Proclamation was challenged on the ground that the Tariff Commission had not afforded the hearing prescribed by statute because it had failed to disclose certain cost information received under a pledge of secrecy.[8] This Court held that the Com-

[8] The statute there applicable, Section 315(c) of the Tariff Act of 1922, 42 Stat. 941, 942–943, which the Court quoted, was similar to Section 4(j) of the Communications Act of 1934 in that it provided that the Tariff Commission was "authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary."

mission's hearing met the required standards of fairness notwithstanding the non-disclosure (288 U.S. at 321–322):

> If [the Tariff Commission] was under a duty to give the kind of hearing that was fair in all circumstances, it was free to shape its course within reasonable limits by its own conception of the promptings of policy and fairness. It would have kept within the statute even though it had made the hearings private and had refrained from the publication of anything, either the records of its agents or the testimony of witnesses * * *. Instead, it made the hearings public, and exposed everything to view except only when publication was likely in its judgment to result in hardship or injustice. * * *

The ruling sustained in the *Norwegian Nitrogen* case imposed confidentiality on certain information rather than requiring its public disclosure. See also *Bowles* v. *Baer*, 142 F. 2d 787 (C.A. 7) *Woolley v. United States*, 97 F. 2d 258 (C.A. 9), certiorari denied, 305 U.S. 614. But the same principle applies to an investigating agency's decision that publicity rather than secrecy be the rule.[9] In *American Sumatra Tobacco*

[9] Compare *Yellin* v. *United States*, 374 U.S. 109, which involved a Congressional investigating committee's failure to pass upon a witness' request for *in camera* proceedings. Executive session was authorized by the committee's own rules, and the Court noted that the committee might have "in its discretion * * * decide[d] thereafter to hold a public hearing." 374 U.S. at 118.

Corp v. *Securities and Exchange Commission*, 110 F. 2d 117 (C.A. D.C.), the issue was whether the agency could be required to receive a certain financial statement in confidence. In sustaining the Commission's refusal to accord confidential status to the information, the court said (110 F. 2d at 120):

> [U]nquestionably Congress, in giving a registrant the right to file objection to publication and in authorizing the Commission to grant or refuse the request in the exercise of a sound judicial discretion, imposed on the Commission the duty of considering the claimed danger of loss and damage and of weighing it in the scale of public interest. And this, at least, is what the Commission has attempted to do and, if the conclusion reached is just as likely to be correct as incorrect, it is our duty to let it stand.

Recognizing that the company might have legitimate apprehensions as to the consequences of disclosure, the court nevertheless viewed its own role as limited to policing the agency's discretion (*ibid.*; emphasis supplied):

> [I]f the question were before us an an original proposition, we could easily see our way to sustaining the objections to general publication. *But the question is primarily not for us but for the Commission,* and Congress unquestionably intended that the Commission should bring to bear upon the decision of this and like questions, what has been called in cases within the jurisdiction of the Interstate Commerce Commission, the knowledge and experience of experts. This does not by any means set up

> an inquisition destructive of the rights of the individual. The delegated power is not to be exercised arbitrarily or to be considered an unfettered discretion over the property of the citizen. Its exercise is subject to review. But so long as the Commission's decision rests on substantial evidence and on inferences which are not arbitrary and capricious, it should be sustained. * * *

It appears to follow *a fortiori* from the *American Sumatra* decision that the Federal Communications Commission has discretion to require the public disclosure of information within its investigatory jurisdiction. For the agency involved in *American Sumatra*—the Securities and Exchange Commission—was empowered by statute to make filed documents public "only when in its judgment a disclosure of such information is in the public interest." Section 24(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78x(b). In other words, under the Securities Exchange Act the Commission has the burden of demonstrating that public disclosure of information submitted with a request for secrecy is "in the public interest." In the case of the Federal Communications Commission, on the other hand, the general rule favors disclosure (see pp. 28, 30, *infra*), and there is no provision in the Communications Act analogous to Section 24(b) of the Securities Exchange Act.

Nor is the *American Sumatra* decision distinguishable for any of the reasons suggested by respondents (Br. in Op., pp. 11–12). The fact that the Communications Act does not authorize a procedure

whereby information may be filed confidentially and then disclosed after the Commission considers whether or not it should be made public has no bearing on the standard by which the agency's determination should be judicially reviewed. If, as here, the demand is for specific information—*i.e.*, "[a] list of * * * television programs" defined with particularity—the agency is as fully able to exercise a discretionary judgment regarding confidentiality as if the information were preliminarily submitted to it *in camera*.[10] Nor is there any distinction between this case and *American Sumatra* on the ground that the Securities Exchange Act's "regulatory scheme * * * [rel]ies primarily upon a disclosure concept" (Br. in Op., p. 11). As we demonstrate below (pp. 28, 30, *infra*), investigatory hearings by the Federal Communications Commission depend, at least to the same degree, on "a disclosure concept." And, finally, the fact that respondents here are not subject to regulation by the Commission is a distinction without a difference. In an investigatory hearing, regulation is not an issue; the only relevant question is whether the witness has evidence which would assist the inquiry. Respondents here obviously have such information, and whether or not they are subject to the Commission's regulatory powers, their information must be produced upon a reasonable and lawful

[10] If the demand is so broad that there is no way for the agency to pass on the confidentiality request without first examining the documents, it might well be an abuse of discretion for it to compel public production without prior *in camera* inspection and judicial review of an adverse determination.

demand by the Commission. Any other rule would produce the anomalous result that the Commission could, in an investigatory proceeding, more freely render procedural rulings against witnesses subject to its regulation than against witnesses who are beyond its regulatory powers.

The limited scope of judicial review over rulings such as those in this case and in *American Sumatra* has been noted in other decisions.[11] The rule adopted by these cases is based on the general principle, discussed above, that within the bounds of fair and reasonable procedures, administrative agencies should be left free to conduct investigations in such manner as they deem most conducive to the orderly and efficient execution of their responsibilities. In conducting an investigation, an administrative agency

[11] See *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission*, 93 F. 2d 236, 239 (C.A. D.C.): "[T]he discretion committed to the Commission, as to the determination of public interest and as to the question whether or not trade secrets or processes are involved, is a judicial discretion and requires the exercise of judgment"; *E. Griffiths Hughes, Inc.* v. *Federal Trade Commission*, 63 F. 2d 362, 364 (C.A. D.C.): "Doubtless on such a hearing as is here provided the Commission has discretion, on a showing that such a hearing would disclose trade secrets or other data in itself destructive of the business under investigation, to do whatever is proper and necessary to avoid these consequences"; *Securities and Exchange Commission* v. *Harrison*, 80 F. Supp. 226, 229 (D.D.C.): "It is a well recognized principle of administrative law that investigations ought to be so conducted that harmful publicity will not be used in lieu of sanctions provided by law, but it must rest in the sound discretion of the agency created by the Congress, and not with the courts, to determine when investigations are to be conducted by open or closed hearing." See, generally, Forkosch, *Administrative Law* (1956), p. 313.

must make a multitude of choices as to how to proceed. It should be free to act on those choices except if it can it can be shown that it has acted arbitrarily or capriciously or if it exceeds some specific statutory limitation.

For this reason, it is no answer to say, as respondents do, that the district court's order demonstrated a "sensible approach" to the problem (Br. in Op., p. 8). The district court had no authority to formulate its own approach; it could reject the Commission's decision only if that decision were arbitrary or if it violated some statutory rule.[12]

Respondents do not claim—nor could they—that the rejection of their request for secrecy violated the Administrative Procedure Act or any other applicable statute. Indeed, the Administrative Procedure Act itself encourages disclosure (p. 28, *infra*), and it contains no provision limiting the Commission's discretion to deal with this question. Consequently, we submit that there is no basis for suggesting that the Commission exceeded its authority.

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[12] Respondents cite cases in which subpoenas by administrative agencies were modified by district courts in order to require the subpoenaed matter to be held confidential (Br. in Op., p. 12). But in none of those cases was there any issue as to the standard by which the agency's exercise of discretion should be reviewed, nor was there any challenge by the agency to the court's authority to modify the subpoena.

II

THE COMMISSION PROPERLY PLACED THE BURDEN ON RESPONDENTS TO ESTABLISH THAT THE USUAL PUBLIC PROCEEDING OUGHT NOT BE HELD

The Commission rejected respondent's request for confidentiality on the ground that "public proceedings should be the rule," and that exceptions to that rule should be granted "only in those extraordinary instances where disclosure would irreparably damage private, competitive interests and where such interests could be found by the Presiding Officer to outweigh the paramount interest of the public and the Commission in full public disclosure" (R. 11). Establishing this presumption in favor of public proceedings was a reasonable exercise of the Commission's procedural rule-making authority, and it accorded with the general public policy strongly favoring disclosure of agency and court proceedings.

It is "the fundamental policy of free societies that justice is usually promoted by disclosure rather than secrecy." *Boeing Airplane Co.* v. *Coggeshall,* 280 F. 2d 654, 662 (C.A. D.C.). The reasons underlying this policy's application in judicial proceedings are elaborated in 6 Wigmore, *Evidence* (1940), § 1834, and on that policy rests Rule 43(a) of the Federal Rules of Civil Procedure, which provides that "the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules."

Recognizing the presumption in favor of public disclosure with respect to proceedings before administrative agencies, Congress provided in Section 3(c) of the Administrative Procedure Act, 5 U.S.C. 1002(c), that:

> Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

This statute has been interpreted to apply to "pleadings, transcripts of testimony, exhibits, and all documents received in evidence or made a part of the record" in any "formal proceedings." Attorney General's Manual on the Administrative Procedure Act (1947), p. 24. And in *Graber Mfg. Co.* v. *Dixon*, 223 F. Supp. 1020, 1022 (D.D.C.), the court said, "Of course, the public interest in open hearings places the burden on the plaintiffs to show that their documents should be received in confidence." See, also, Report of the Attorney General's Committee on Administrative Procedure (1941), p. 68; 1 Davis, *Administrative Law Treatise* (1958), p. 553.

The Communications Act of 1934 itself reflects this policy in the provision of Section 4(j), 47 U.S.C. 154(j) which states, "Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested." This consistent view certainly warranted the Commission's adoption of a rule placing

on the proponent of any request for secrecy the burden of demonstrating that secrecy is warranted. Such a rule is consistent with the allocation of the burden of proof in a judicial proceeding: "[A] person claiming that he needs to keep these things [business secrets] secret at all should be expected to make the exigency particularly plain." 8 Wigmore, *Evidence* (McNaughton Rev. 1961), § 2212, p. 156.[13] See, also, 49 U.S.C. 1504 (Federal Aviation Act); Atomic Energy Commission, Rules of Practice, 10 C.F.R. § 2.790(b); *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184.

Moreover, in this particular case disclosure was especially important. By making public the information received from any of its witnesses, the Commission hoped to stimulate other interested groups and individuals to come forward and "verify, refute, explain, amplify or supplement the record from their own diverse points of view" (R. 11). In this way the Commission expected to build a full and complete public record upon which it and Congress might act. This public record would serve the dual function of

[13] In accord with these views are those of Viscount Haldane, Lord Chancellor, who said in *Scott* v. *Scott* (1913) A.C. 417, 437–438 (House of Lords) (emphasis supplied):

> It may often be necessary, in order to attain its primary object, that the Court should exclude the public. * * * As the paramount object must always be to do justice, the general rule as to publicity * * * must accordingly yield. *But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration.* * * *

informing the broadcasting industry of the factual basis supporting any regulatory actions which the Commission might ultimately take (R. 10) and providing information for future legislation.

In addition, public disclosure was necessary for the execution of the Commission's duty under Section 4(k) of the Communications Act of 1934, as amended, 47 U.S.C. 154(k), to make an annual report to Congress concerning, *inter alia*, such information and data collected during the preceding year "as may be considered of value in the determination of questions connected with the regulation of * * * radio communication and radio transmission of energy * * *."[14] Indeed, this very investigation was specially authorized by Congress so that Congress might "draw upon the facts which are obtained," as Senator Magnuson advised the Senate. See p. 7, *supra;* 101 Cong. Rec. 7629.

It appears quite clear, therefore, that compelling reasons dictated open and public proceedings in this case. Even so, the Commission recognized that extraordinary circumstances might warrant the receipt of testimony and documents in non-public sessions. Private proceedings were therefore authorized "to the extent that the public interest, the proper dispatch of the business of said proceding, or the ends of justice will be served thereby" (R. 22). But the Commission chose to place the burden on the proponent of confidentiality to demonstrate the need for non-public sessions. And it followed the accepted rule that this

[14] Wide distribution of copies of this annual report is authorized. 47 U.S.C. 154(k).

burden could not be met merely by an assertion that disclosure could inconvenience the witness (R. 11).[15] Consequently, this procedural ruling provided adequate protection for legitimate claims of confidentiality by permitting private sessions whenever the damage resulting from disclosure would outweigh the need for public knowledge of subpoenaed evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals be modified so as to strike paragraph 2 of the district court's order, and that the district court be directed to enforce the Commission's order and subpoena without qualification.[16]

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[15] Cf. *United States* v. *Purdome*, 30 F.R.D. 338 (W.D. Mo.); *Sacks* v. *Frank H. Lee Co.*, 18 F.R.D. 500 (S.D.N.Y.).

[16] We believe that it is plain, on this record, that the Commission did not abuse its discretion. But if the Court is of the view that that question is still open, the judgment should be reversed and the case remanded to the district court for judicial review under the appropriate standard.

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